IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.229 OF 1993

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Municipal Corporation of Gr.
Bombay ...Petitioners

v/s.

M/s. Michigan Engineers Pvt.
Ltd. ...Respondents

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Mr.R.D.Dhanuka with Mr.Pimple for the Petitioner.

Mr.S.S.Purohit i/b M/s.Bagla Dandekar & Co. for the Respondents.

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**CORAM: D.K.DESHMUKH, J.**

**DATED:** 21ST NOVEMBER,2005

**P.C.:**

1. By this petition the Petitioner/Bombay Municipal Corporation challenges the award made by the sole arbitrator dated 12-4-1993 directing the Petitioner to make payment at the enhanced rate against item at serial No.2. The Bombay Municipal Corporation had invited the tenders for the work of construction of fine screens, aerated grit chamber etc. at Bhandup and Ghatkopar. In response to the tender notice, the Respondent had submitted a tender, which was accepted. The work was carried out. There were disputes between the parties. Disputes were, as per the contract between the parties, referred to arbitration.

2. Claim No.1 of the Respondent was that according contract for the work of installation of stone columns under item nos. 2, 3, 3a, 4 and 5 of Contracts 10/A and 11/A driving closed ended tube of 400 mm diameter with special equipment. According to the Respondent in stead of allowing the Respondent to do the work as per the contract the Petitioner

ordered using 750 mm diameter closed ended tube for execution of these items of work for installation of stone columns. According to the Respondent in the contract two alternative methods for carrying out this work were given. The choice of one of the two methods for carrying out the work was left to the Respondent/claimant. Despite that the Petitioner forced the Respondent to carry out the work of installation of stone columns by using 750 mm dia instead of 400 mm dia. Therefore, according to the Respondent, the Respondent was entitled to payment at the enhanced rate. The case of the Petitioner was that there were two methods given in the contract for carrying out the work. The contractor/claimant has carried out the work according to one of the two methods provided in the contract itself and therefore the Petitioner has to make payment only at the rate which is mentioned in the contract and not at any enhanced rate. The arbitrator has held that there were two alternate methods provided in the contract for carrying out the work, in February, 1990 approval was given by the Corporation for doing the work using 400 mm diameter, but that approval was withdrawn in May, 1990. Thus, the Respondent was forced to carry out the work with 400 mm diameter with cast iron

Dispensable Conical Shoe by using conventional method. According to award, this resulted in the contractor/Respondent incurring additional expenditure and therefore he has to be compensated. The learned arbitrator has also held that the Respondent should have led evidence to show what is the additional expenditure incurred by him. However, the Respondent has not led any evidence to prove what is the additional expenditure incurred by him. Still according to the arbitrator as the Respondent has incurred additional expenditure, it would be reasonable to grant to the Respondent enhanced higher rate at 3rd of the rate claimed by the Respondent, and therefore, the learned arbitrator fixed the enhanced rate per unit at Rs.7312.00 against item at serial No.2. It is this award which is challenged in the present petition.

3. According to the learned Counsel appearing for the Petitioner even assuming that the finding recorded by the learned arbitrator that there were two alternative methods for carrying out the work were provided in the contract, that choice of one of the two methods was left to the contractor, and that the Corporation forced the contractor to adopt one of

the two methods. Still the fact remains, the contractor has carried out the work according to one of the two methods provided in the contract and therefore he is entitled to be paid only at the rate provided in the contract. In the contract the same rate was quoted for carrying out the work by any of the two methods. It is further submitted that even if it is assumed that the Corporation forced the contractor contrary to the terms of the contract to carry out the work by one of the two methods, then also it amounts to breach of contract and therefore the contractor may be entitled to claim enhanced payment by way of damages. But for successfully claiming enhancement in the rate in such a situation the contractor will have to prove firstly that he has in fact suffered loss and secondly extent of loss suffered by him. It is submitted that the learned arbitrator himself has observed that the contractor has not led any evidence either to prove the actual expenditure incurred by him in carrying out the work nor has he led evidence to show that he has suffered any loss in carrying out the work by adopting the particular method chosen by the Corporation. The learned Counsel appearing for the Respondent/ Contractor, on the other hand, submits that according

to contract there were two methods provided. The contractor had experience in one of the two methods provided. The contract had given choice to the contractor to carry out the work in one of the two methods still the Corporation forced the contractor to carry out the work by adopting a particular method and therefore, as the method which was not chosen by the contractor was forced on the contractor, the contractor was entitled to payment at the enhanced rate. It is further submitted that so far as other submission of the learned Counsel appearing for the Corporation in relation to payment of damages is concerned, that is not raised in the petition. Therefore, the petitioner cannot be permitted to raise the same.

4. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the contract provides the rate at which the work was to be carried out. The contract also provided two alternative methods for carrying out the work. Therefore, if it is an admitted position that the work was carried by the Respondent by adopting one of the two methods provided in the contract, it will amount to saying that the work was carried out by

adopting the method which is provided for in the contract and therefore all that the contractor would be entitled to is the rate which is provided for in the contract itself. The contractor is justified in claiming payment at the enhanced rate, if he establishes that it was his right to choose one of the two methods provided in the contract and by denying that right to him, the Corporation has committed breach of the contract and therefore, he is entitled to be compensated for the loss that he has suffered because the Corporation forced him to carry out the work by adopting a particular method contrary to the terms of the contract. The work was carried out as provided in the contract by one of the two methods provided in the contract and therefore all that the contractor would be entitled to is payment as per the rate provided in the contract. A question of contractor claiming enhanced rate would come in only in case it is claimed that the contract is breached by the Corporation. In any case, there can be no justification for the contractor claiming any payment without proving that he has actually incurred that expenditure. Perusal of the award shows that the learned arbitrator has assumed that additional expenditure was incurred by the contractor, though

the contractor has not proved it as a fact that he has incurred any additional expenditure and the learned arbitrator has also assumed what would be the extent of additional expenditure incurred by the contractor. In my opinion, therefore, the award made by the learned arbitrator is an award made without there being evidence on record. So far as the contention of the learned Counsel appearing for the Respondent that there is no ground in the petition challenging the award on this ground is concerned, in my opinion, perusal of grounds (d) & (e) in the petition shows that the ground has in terms been raised by the Petitioner in the petition. In as much as, the Corporation claims that as the work was carried out in accordance with the contract by adopting one of the two methods provided in the contract, all that the contractor was entitled to was payment as per the rate provided in the contract and nothing else. In my opinion, in the absence of any proof of additional expenditure incurred by the contractor, there was no justification whatsoever for directing the Corporation to make payment at any enhanced rate. The award made by the learned arbitrator to that extent is liable to be modified. The award, therefore, is modified to the following

extent.

. The directions contained in the award for making the payment at the rate of Rs.7312/- per unit against item at serial No.2 is set aside.

. Award stands modified to the above extent. Respondent shall pay costs of this petition to the Petitioner as incurred by the Petitioner.

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